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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 461

HOOPER ENLOE DENTON ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3–7) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1962 (R. 809–811; Pet. App. 1–2, 3). The petition for a writ of certiorari was filed on September 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the convictions of petitioners Phillips and Webb for

violation of the Internal Revenue laws relating to liquor.

2. Whether various rulings on the evidence were proper.

3. Whether the trial court properly denied motions to suppress testimonial evidence challenged by petitioners on the ground that it was obtained by deceit.

4. Whether the trial court properly charged the jury on the defense of entrapment.

5. Whether the convictions were void because an attorney from the Internal Revenue Service assisted the Assistant United States Attorney at the trial.

STATUTE INVOLVED

Section 507 of Title 28 of the United States Code provides in pertinent part:

> (a) Except as otherwise provided by law, it shall be the duty of each United States attorney, within his district, to:
>
> (1) Prosecute for all offenses against the United States;
>
> * * * *

STATEMENT

A twelve-count indictment returned in the United States District Court for the Eastern District of Tennessee charged the petitioners and two others with conspiracy and various substantive offenses relating to the manufacture, concealment and sale of untaxed whiskey, in violation of 18 U.S.C. 371 and 26 U.S.C.

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5205(a)(2), 5605(a), 5691(a) and 7206(4) (R. 7–13).[1] Before trial, petitioners Denton and Webb moved to suppress testimonial evidence to be given by government agents on the ground that such evidence had been obtained through use of fraud and deception amounting to an unlawful trespass (R. 18–19, 21). The motions were denied after a hearing (R. 22, 230–231, 242). Following a trial by jury, Denton was found guilty as charged on six counts. Phillips and Webb were found guilty on two substantive counts and were acquitted on the conspiracy count (R. 791).[2] On October 6, 1961, Denton was sentenced to concurrent terms of imprisonment of five years on three counts, and to lesser concurrent terms on the remaining three counts; Phillips was sentenced to concurrent terms of imprisonment of one year on two counts, the

[1] Specifically, the indictment charged that Denton, Phillips, Webb, Costner and Sutton conspired to transport and sell untaxed whiskey, to carry on the business of wholesale and retail liquor dealers without having paid the special tax therefor, to defeat and evade taxes due the United States on distilled spirits, and to remove and conceal goods with the intent to defraud the United States of taxes (count 1). The indictment also charged that Denton (5 counts), Phillips (2 counts), Webb (2 counts), Costner (5 counts) and Sutton (3 counts) possessed and sold untaxed whiskey, removed and concealed whiskey with the intent to defeat the assessment and collection of taxes, and carried on the business of wholesale liquor dealers without having paid the special tax therefor (counts 2–9) (R. 7–13). Three counts (counts 10–12), together with two overt acts on the conspiracy count (overt acts 9 and 10), were dismissed on the government's motion before trial (R. 244).

[2] Two co-defendants, Lonzo Sutton and Albert Costner, were found guilty on three and six counts, respectively (R. 791).

sentence to commence at the expiration of a sentence which he was then serving; and Webb was placed on probation for five years on two counts (R. 24–25, 26–27, 28–29). The convictions were affirmed on appeal (R. 809–811; Pet. App. 1–2, 3–7).

The pertinent facts may be summarized as follows:

1. The chief government witnesses were Alcohol and Tobacco Tax Investigator Artha Bryant and one John Prevatte who operated in undercover capacities in Cocke County, Tennessee, during the period covered by the indictment. Prevatte was a paid informer for the Alcohol and Tobacco Tax Division and had been employed in that capacity at varying intervals from about December 1958 down to the date of the trial (R. 247, 308–309, 343, 372, 416–417, 430, 462, 464, 493). Prevatte's compensation included subsistence pay of $10.00 per day, together with a prospect of receiving "rewards" for work in connection with the apprehension of major liquor violators (R. 308–309, 344–346, 372, 417, 427–428, 431, 432). In early July 1960, Prevatte was given a list of "major violators" of the Internal Revenue Laws relating to liquor in the Cocke County section of Tennessee (R. 311, 313, 373, 490; see R. 431–432). Petitioner Denton and co-defendant Albert Costner were included on that list.

Prevatte and Bryant went to the Cosby section of Cocke County to "play it by ear"—to be seen, make contacts and meet people (R. 319). Prevatte subsequently met a convict friend, one Swan Owenby (R. 374). Owenby had "gotten the word out" that Prevatte was a large liquor dealer, and that Bryant

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was Prevatte's driver (R. 319). With assistance from Owenby, Bryant and Prevatte purchased 15 cases of moonshine whiskey from Costner in late July 1960 (R. 248–254, 312, 327, 374–376, 379, 388).

During July and August 1960, Prevatte frequented the tavern of Scott Denton, brother of petitioner Denton (R. 388–389), and told Scott that he was interested in renting a place of business in the area (R. 436, 459–460). When apprised that petitioner Denton was having a business establishment built in the area, Prevatte told Scott that he would be interested in renting that establishment (R. 333).

On August 26, 1960, Scott introduced Prevatte to petitioner Denton (R. 388, 390–391, 472). Prevatte had a "genuine interest" in renting Denton's proposed business establishment in order "to establish himself," and discussions concerning liquor were incidental to this purpose (R. 323–327, 470–471). When apprised that the building under construction would not be ready for rental until October or November 1960, Scott told Denton that Prevatte wanted to haul a few loads of whiskey until such time as he could find a place of business (R. 329–330, 339, 390). Prevatte said that he had a man to do the actual hauling of whiskey for him (R. 393). After some discussion on the subject, petitioner Denton agreed to sell whiskey to Prevatte for $17.00 per case (R. 395).

At about 12:30 a.m. on August 29, 1960, Bryant and Prevatte went to Denton's house and parked a government automobile in the back yard area (R. 395–396). Prevatte introduced Bryant as his driver (R. 474). After some conversation concerning liquor, Denton

told Prevatte and Bryant that he was taking a "chance" on them, and that if he got into any trouble over the proposed liquor sale, he would kill someone (R. 263, 264, 397).

Early the next morning, Prevatte told Denton to put 25 cases of whiskey in the automobile (R. 401). Denton said that Prevatte and Bryant could not go to the "stash," and that he would send a boy to load the automobile (R. 264). Shortly thereafter, Denton went outside and said something, after which someone drove off in an automobile (R. 265). At about this time, petitioner Phillips was standing in the back porch area of Denton's house. Denton told Phillips to be ready to clean the mud off the automobile when the boy returned with the whiskey (R. 266). When Denton, in the presence of Prevatte, Bryant and Phillips, said that the ATU had "cut a lot of stills" in the area, and that he had just purchased a still for $205, Phillips inquired "if it wasn't $270.00 that it cost" (R. 270). Denton said that $65 was for the "worm" (R. 270).

At about 9:15 a.m., Webb drove up in the government automobile, and Denton, Phillips, Prevatte and Bryant went outside (R. 274, 349–350, 402). Webb, a son-in-law of Denton, said that he did not believe the automobile "sat down too much considering it had seventeen cases in the trunk compartment and eight in the back seat" (R. 275, 403). At the direction of Denton, however, Webb, accompanied by Phillips, drove the automobile to Costner's house, which was a short distance away, for some air (R. 276–277, 353–354, 404). In the meantime, Prevatte paid Denton

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$425 for the whiskey out of government funds (R. 411). Prevatte and Bryant then drove to Costner's residence in another automobile, where they helped Webb and Phillips put air in the tires and air lifts of the loaded automobile (R. 279, 353–354, 406). Phillips remarked that he wished he had all the whiskey he helped load (R. 278). Bryant and Prevatte drove to the vicinity of Greenville where they turned over the whiskey to ATU agents (R. 281–282, 407, 482–483).

Eight days later, on September 6, 1960, at about 6:00 a.m., Bryant and Prevatte drove up to Denton's residence and parked a government automobile. Denton met them, and asked if they had had extra springs put on the car, and said that he had made plans to have a man put some extra springs under the automobile to help support the load (R. 282–283). Prevatte said that they wanted to pick up the whiskey and leave that day because a holiday weekend was coming up and their customers were out of whiskey (R. 284, 409). After Denton had purchased a large quantity of paper bags for Prevatte (to be used in wrapping the individual half-gallon jars of whiskey), Prevatte paid Denton $425 from government funds (R. 287, 290, 299, 410–411). Denton told the two men that they should pick up the whiskey at Costner's house. Shortly after Prevatte and Bryant arrived at Costner's house, Denton entered that house and tested the whiskey with a hydrometer (R. 296, 414). The automobile was loaded with 25 cases of whiskey which Prevatte and Bryant later turned over to ATU agents (R. 415–416, 483).

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Petitioners did not have a wholesale liquor dealer tax stamp, and the liquor sold to Prevatte and Bryant was untaxed (R. 481–483). After the apprehension of the petitioners and their co-defendants, the Alcohol and Tobacco Tax Division paid Prevatte rewards of $800 for work in connection with Denton and $100 for work in connection with Costner (R. 346; see R. 493).

2. Webb testified that he drove the government automobile from Denton's residence on August 29, 1960; that "something" in the back seat area of the automobile was covered with a blanket but he did not know what it was (R. 590–594). He later pumped some air in the tires and "springs" of the automobile (R. 595–596, 598). Phillips admitted that he assisted Webb and others in pumping air into the tires of the government automobile on August 29, 1960, but denied knowledge of what was under the blanket in the automobile on that date (R. 566, 573, 578–579). Denton testified that he had nothing to do with any whiskey during the periods in question (R. 689, 700, 705–706, 711). He admitted that he obtained a quantity of paper bags for Prevatte on September 6, 1960, and that he went to Costner's house later that day where, at the request of Prevatte and Bryant, he tested some whiskey (R. 691–692, 695–696, 721–722). He denied any interest in the whiskey at Costner's house (R. 699).

At the conclusion of the case, the court overruled motions for acquittal on grounds of entrapment and insufficiency of evidence (R. 743–744).

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ARGUMENT

1. There is no merit to the contention of petitioners Phillips and Webb (Pet. 15–16) that the evidence is insufficient to support their convictions. Webb admitted that he drove the car which carried the whiskey and both Webb and Phillips helped in putting air in the tires and air lifts. The jury could properly find that these acts were done with knowledge and intent to assist in the possession, sale and transfer of untaxed whiskey, as charged in count five.[3] Webb's knowledge was shown by the statement that he did not believe that the car sat too low considering the fact that there were 17 cases in the trunk and eight cases in the back seat area. Phillips' knowledge was shown by his remarks as to the cost of the still (*see infra*, pp. 9–10) and his statement that he wished he had all the whiskey he helped load (R. 278).

2. Petitioners objections to various items of evidence (Pet. 13–15) were properly denied.

a. *Testimony concerning the purchase of a distillery.*—At the trial, Bryant testified that on August 29, 1960, Denton remarked to him that the ATU had "cut a lot of stills" in the area, and that he had purchased a solid copper still for $205 (R. 269–270). At that point, Phillips, who was nearby, asked Denton "if it wasn't $270.00 that it cost," to which Denton replied that the cost was $205, and that $65 was for the

[3] Since petitioners Phillips and Webb received equal concurrent sentences on counts 5 and 6—the only counts on which they were convicted—their convictions may be sustained by showing that the evidence supported the convictions on count 5. See *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *Emspak* v. *United States*, 349 U.S. 190, 195, fn. 9.

"worm" of the still (R. 270). Objection to this testimony was overruled.

These admissions not only tended to show the element of criminal intent on the part of Denton and Phillips as to the various counts of the indictment, but tended to establish the existence of the general conspiracy to deal in illicit liquor and their connection therewith. The evidence, therefore, was admissible. See *United States* v. *Weinberg,* 226 F. 2d 161, 172 (C.A. 3), certiorari denied, 350 U.S. 933; *Smith* v. *United States,* 236 F. 2d 260, 267–268 (C.A. 8), certiorari denied, 352 U.S. 909; *Bracey* v. *United States,* 142 F. 2d 85, 87–88 (C.A.D.C.), certiorari denied, 322 U.S. 762, and cases cited; *Tandberg-Hanssen* v. *United States,* 284 F. 2d 331, 333 (C.A. 10); *Fitts* v. *United States,* 284 F. 2d 108, 110 (C.A. 10).

b. *The cross-examination of Prevatte.*—Over objections of government counsel, the court permitted counsel for the petitioners to cross-examine Prevatte as to his activities in North Carolina subsequent to September 6, 1960 (after the conspiracy was alleged to have ended and after the last purchase of whiskey had been made), concerning his activities in Tennessee in 1961, and into his relationship with some young women at Scott Denton's tavern (R. 442–444, 445, 451–458). Prevatte testified fully as to his relationship with the ATU in the instant case, including the matter of compensation. He admitted that he had worked as an informer for the ATU in North Carolina, South Carolina and Tennessee. Prevatte said that he had made certain untruthful statements

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to Denton in the past (R. 449–450). When defense counsel asked Prevatte whether he saw "anything wrong with telling a man a falsehood in order to get him arrested?" the court sustained an objection by government counsel (R. 450). At a later point in the cross-examination, the court refused to permit counsel to examine Prevatte as to his activities in Kentucky on matters which were then under investigation by authorities there (R. 466–469).

Petitioners contend (Pet. 13–14) that the district court erred in so limiting the cross-examination because the areas sought to be covered bore upon the credibility of Prevatte. These minor limitations in the very liberal scope allowed for cross-examination were, however, well within the permissible discretion of the trial judge. *Glasser* v. *United States,* 315 U.S. 60, 83.

c. *The cross-examination of petitioner Denton as to a felony for which he had been pardoned.*—At the trial, the court permitted the Assistant United States Attorney, over objection of defense counsel, to ask Denton whether he had been convicted in 1936 of second-degree murder (R. 732–734). Denton admitted the date of the conviction and said that it had been reduced to voluntary manslaughter, and that he had subsequently received a pardon from the governor (R. 734).

Petitioner Denton contends (Pet. 14–15) that in view of the pardon, the prosecutor's inquiry was improper. The short answer, however, is that a pardon merely relieves a person of the penal and civil rights consequences of a conviction of crime; it does not wipe

out the fact of conviction. In accordance with this principle, the uniform rule in federal, state and English courts is that the credibility of witnesses may be impeached by showing a prior conviction of felony notwithstanding the fact that a full and unconditional pardon had been granted. *Richards* v. *United States,* 192 F. 2d 602, 605–608 (C.A. D.C.), certiorari denied, 342 U.S. 946; *Vedin* v. *McConnell,* 22 F. 2d 753, 754 (C.A. 9); *Bryant* v. *United States,* 257 Fed. 378, 383 (C.A. 5); *Wallamet R. T. Co.* v. *Oregon S. N. Co.,* Fed. Cas. No. 17,106, 29 Fed. Cas. 88, 90 (D. Ore.) (1876); *United States* v. *Jones,* Fed. Case No. 15,493, 26 Fed. Cas. 644, 648 (C.C. D. N.Y.) (1824); see cases collected in 30 A. L. R. 2d 893–897; *Rex.* v. *Rookwood,* 90 Eng. Repr. 1277 (1696); 2 Hale, *Pleas of the Crown,* 278 (1847); See 3 Wigmore, *Evidence,* Sec. 980(3); McCormick *Evidence,* Sec. 43 at p. 91. In *Carlisi* v. *New York,* 233 U.S. 51, this Court recognized that a presidential pardon did not wipe out the fact of conviction in holding that such a pardon did not prevent a state from imposing increased punishment as a second offender based on the conviction for which the pardon had been granted.[4]

[4] *United States* v. *Wilson,* 7 Pet. 150, and *Ex parte Garland,* 4 Wall. 333, on which petitioner relies, are not to the contrary. In the *Wilson* case, this Court merely held that federal courts could not take judicial notice of presidential pardons, that such pardons would have to be pleaded or specifically brought before the courts. The statement in *Garland* on which petitioners rely was made in the context of a situation where the Court found that Congress was endeavoring to impose additional punishment for the pardoned act. *Garland* was cited to the Court in *Carlisi* v. *New York, supra.*

In this case, moreover, the court was careful to instruct the jury throughout the trial that evidence of prior convictions could be used by them only on the issue of credibility—not as evidence of guilt on the charges in the indictment (R. 546–547, 583, 600, 733, 735). The jury is presumed to have followed these instructions. *Opper* v. *United States,* 348 U.S. 84, 95; *Delli Paoli* v. *United States,* 352 U.S. 232, 242.

3. Petitioners contend (Pet. 7–8) that the district court erred in refusing to suppress the testimony of Prevatte and Bryant regarding their contacts with the petitioners. In other words, they argue that the court should, as a matter of law, have found that the conduct of the government agents amounted to entrapment. It is, however, well established that government agents may resort to a ruse to uncover criminals so long as they do not induce an unwilling or innocent person to commit a crime. *Sherman* v. *United States,* 356 U.S. 369, 372–374; *Sorrells* v. *United States,* 287 U.S. 435, 441–442, 451. There is nothing in the record to indicate that government agents implanted in the minds of the petitioners the disposition to commit the instant offenses or that the criminal conduct was produced by the "creative activity" of those agents. The ease with which the sales were effected shows that petitioners were already in the illegal liquor business when the government agents appeared on the scene. The issue of entrapment was properly left for the jury to decide.

4. In its instructions on entrapment the court distinguished between lawful and unlawful entrapment. It said that the law forbids a conviction

wherever there is an unlawful entrapment which the court defined as "[w]here a person has no previous intent or purpose in violating the law but is induced or persuaded by law enforcement officers to commit a crime" (R. 775). It charged that the petitioners should be acquitted if the jury found that they had no previous intent to commit any offense, but did so only because persuaded by some agent of the government. The court defined lawful entrapment as that conduct of government agents which provides people who already possess the readiness and willingness to break the law a favorable opportunity to do so (R. 775–776).

These instructions leave no room for petitioners' complaint (Pet. 12) that the court erred in refusing to charge the jury that the function of law-enforcement officials is not the manufacture of crime, and that entrapment occurs when the criminal conduct is the product of the creative activity of law-enforcement officials. In distinguishing between permissible and impermissible conduct on the part of government agents in this area, the court adequately covered the substance of the requested instructions. The claim (Pet. 12–13) that the court erred in refusing to charge the jury that the petitioners should be acquitted if they found "that the police authorities * * * first suggested the commission of the criminal act to the defendants or lured the defendants into committing such criminal act" is devoid of merit. The fact that law-enforcement officials "first suggested" a particular sale does not, *ipso facto,* constitute entrapment. See *Masciale* v. *United States,* 356 U.S. 386,

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where the court held there was no entrapment as a matter of law although the government agent, from the start, stated that he was interested in buying narcotics.

5. Before the trial commenced, the Assistant United States Attorney in charge of the case introduced to the court William P. Crewe, Assistant Regional Counsel for the Internal Revenue Service, and requested and received permission to have Mr. Crewe "serve as counsel" (R. 44). No objections to the presence of Mr. Crewe were made either at this time or during the trial. During the trial, Mr. Crewe examined two government witnesses, made one objection and delivered the opening argument to the jury (R. 422, 480, 482, 798).

Petitioners' contend (Pet. 9–10) that the district court lacked jurisdiction to proceed to judgment because Mr. Crewe was not qualified by the required oath of office to prosecute for the government. The short answer, however, is that Mr. Crewe did not conduct the prosecution or impinge upon the duty of the United States Attorney to "prosecute * * * offenses against the United States." 28 U.S.C. 507, *supra*. The prosecution was brought in the name of the United States Attorney for the Eastern District of Tennessee (R. 13, 40). The record shows that Assistant United States Attorney Cecil D. Meek was present at all stages of the trial and directed the prosecution, including the pretrial proceedings, to its conclusion. The assistance rendered by Mr. Crewe—limited to the direct examination of two rather inconsequential government witnesses and to the delivery

of a brief opening argument to the jury—did not divest the United States Attorney of control of the case or oust the district court of jurisdiction.[5]

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1962.

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[5] Petitioners' reliance upon *United States* v. *Huston*, 28 F. 2d 451 (N.D. Ohio), *United States* v. *Virginia-Carolina Chemical Co.*, 163 Fed. 66 (M.D. Tenn.) and *United States* v. *1,960 Acres of Land, etc.*, 54 F. Supp. 867 (S.D. Cal.) is misplaced. In *Huston*, the district court dismissed the indictment on the ground that a special assistant to the Attorney General conducted grand jury proceedings in a district to which his special commission from the Attorney General did not apply. In *Virginia-Carolina Chemical Co.*, the district court dismissed an indictment on the ground that a special assistant to the United States Attorney had conducted grand jury proceedings when there existed no statutory authority for such conduct (*i.e.*, prior to the enactment of the Act of June 30, 1906, 34 Stat. 316, 5 U.S.C. 310, which confers such authority). In *1,960 Acres of Land, etc.*, the district court determined that it had no jurisdiction to entertain a land condemnation case brought by a special assistant to the Attorney General on the ground that only a United States Attorney, under the applicable statute, could bring such a suit on behalf of the United States, and that, in any event, the special assistant to the Attorney General had no authority to re-delegate to other special assistants any authority to proceed with the lawsuit.

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